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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

AMENDMENT OF SECTION 73.202(b),
TABLE OF ALLOTMENTS,
FM BROADCAST STATIONS.
(Sugar Hill and Toccoa, Georgia)

MM Docket No. 98-162
RM-9263

To: The Chief, Allocations Branch,
Policy and Rules Division,
Mass Media Bureau

FULLER-JEFFREY RADIO OF NEW ENGLAND, INC.'S REPLY COMMENTS

Fuller-Jeffrey Radio of New England, Inc. ("Fuller-Jeffrey"), the licensee of Class C commercial FM radio broadcasting station WPKQ, Channel 279C in Berlin, New Hampshire, by its undersigned attorney and pursuant to Section 1.420 of the Commission's Rules, hereby respectfully submits these Reply Comments with respect to the Comments that were filed in this proceeding on November 2, 1998 on behalf of Southern Broadcasting of Pensacola, Inc. ("Southern") and LBJS Broadcasting

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Company, L.P. ("LBJS") in response to the Commission's *Notice of Proposed Rule Making* in the above-captioned proceeding, DA 98-1785, adopted on September 2, 1998 and released on September 11, 1998 by the Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau, 63 Fed. Reg. 49682 (published on September 17, 1998 (the "*NPRM*"). In support, Fuller-Jeffrey respectfully submits the following:

1. The instant proceeding involves a proposed amendment to the Table of Allotments for FM Broadcast Stations, Section 73.202(b) of the Commission's Rules. The proposed amendment contemplates the substitution of Class C1 FM radio broadcasting station Channel 291C1 for the existing allotment of Class C FM radio broadcasting station Channel 291C at Toccoa, Georgia, and the removal of the substituted allotment on Channel 291C1 from Toccoa to Sugar Hill, Georgia, with a concomitant modification of Southern's license from the Commission for Class C FM radio broadcasting station WSTE-FM, which operates on Channel 291C at Toccoa. ^{1/}

^{1/} On November 2, 1998, Southern submitted its Comments and Counterproposal in this proceeding, which, *inter alia*, advocate the removal of the substituted Channel 291C1 from Toccoa to Lawrenceville, Georgia. Fuller-Jeffrey does not address the Lawrenceville counterproposal in these Reply Comments.

2. The *NPRM* notes that WSTE-FM commenced operation prior to the Commission's adoption of the station separation requirements for FM broadcasting stations in 1964; that WSTE-FM's antenna site is "short-spaced" under those requirements to the antenna site utilized by third-adjacent-channel Class C FM radio broadcasting station WYAY, Channel 294C in Gainesville, Georgia; and that the short-spacing is "grandfathered." *Id.* at Paragraphs 3-6. The *NPRM* recites that no modifications in WSTE-FM's transmitting facilities are proposed,^{2/} and that this case therefore falls within the ambit of the Commission's policy established in *Newnan and Peachtree City, Georgia*, 7 FCC Rcd 6307 (Chief, Allocations Branch, Policy & Rules Division, Mass Media Bureau, 1992). In that case, the Commission made an exception to its normal practice of refusing to amend the Table of Allotments in a manner that would violate the spacing requirements of Section 73.207 of the Commission's Rules. The rationale of *Newnan and Peachtree City* is that since the affected station is not proposing to modify its facilities in a way that would create any new short-spacing

^{2/} The *NPRM* acknowledges that there is currently pending before the Commission Southern's application for a construction permit to modify WSTE-FM's transmitting facilities, which application specifies a different antenna site for WSTE-FM that would result in additional short-spacings to stations in Canton, Georgia and Alexander, Alabama (File No. BMPH-980128IF). However, the *NPRM* elects not to consider that application in the context of this proceeding. *Id.* at Paragraph 6.

departures from the requirements of Section 73.207, nor exacerbate the existing and grandfathered short-spacing departure from those requirements, the station should have the same opportunity to change its community of license as a station sited in compliance with Section 73.207. Paragraph 5 of the *NPRM* questions whether the Commission should continue to adhere to the policy adopted in *Newnan and Peachtree City* and whether that policy should be extended to post-1964 short-spaced stations. *Id.* at Paragraph 5. ^{3/}

3. Both Southern's Comments and LBJ's Comments in this proceeding support the Commission's continued adherence to the policy established in *Newnan and Peachtree City*. Fuller-Jeffrey hereby adds its voice to that chorus. Fuller-Jeffrey notes that no basis is given for the *sua sponte* decision in the *NPRM* to revisit the policy adopted in *Newnan and Peachtree City*. That policy has served the Commission well for six years, and Fuller-Jeffrey is not aware of any harm to the

^{3/} The latter concern apparently relates primarily to Class A FM radio broadcasting stations which may have become short-spaced by virtue of the Commission's rule modifications in MM Docket No. 88-375, *Amendment of Part 73 of the Rules to Provide for an Additional FM Station Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations*, 4 FCC Rcd 6375 (1989), *on reconsideration*, 6 FCC Rcd 3417 (1991).

public interest that has resulted from the Commission's adherence to that policy during that time. Inasmuch as the policy only applies to situations where the affected station is not proposing to modify its transmitting facilities in a manner that would create new short-spacings or exacerbate the existing and grandfathered short-spacings, no injury is caused to any other station or to the listening public. On the contrary, the policy is wisely designed to give stations which -- through no fault of their own -- find themselves in a grandfathered departure from the spacing requirements of Section 73.207 the same flexibility as stations not so situated to serve a perceived public interest by changing their communities of license in a manner that otherwise satisfies all Commission rules and policies. ^{4/}

4. Fuller-Jeffrey's interest in this proceeding is to protect the vitality of the policy adopted in *Newnan and Peachtree City*. Fuller-Jeffrey is currently involved in a rule making proceeding that contemplates an amendment to the Table of

^{4/} Insofar as the present case involves the proposed re-allocation of Channel 291C1 from Toccoa to either Sugar Hill or Lawrenceville and relates solely to a pre-1964 grandfathered short-spacing between third-adjacent-channel Class C and Class C1 stations, the *NPRM's* concern over Class A FM radio broadcasting station grandfathered short-spacings and other post-1964 short-spacings appears to be misplaced in this proceeding.

Allotments by removing the allotment of Channel 279C from Berlin, New Hampshire to North Conway, New Hampshire, and a concomitant modification to Fuller-Jeffrey's license from the Commission for WPKQ. *Notice of Proposed Rule Making in MM Docket No. 97-216*, 12 FCC Rcd 16403 (Chief, Allocations Branch, Policy & Rules Division, Mass Media Bureau, 1997). The proceeding in MM Docket No. 97-216 bears many similarities to the instant proceeding involving Toccoa, Sugar Hill, and Lawrenceville, Texas: both cases involve pre-1964 (and therefore grandfathered) short-spacings in which the affected station does not propose to modify its transmitting facilities. ^{5/} Both proceedings should follow the policy adopted in *Newnan and Peachtree City*, unless and until someone comes forward with a sound reason not to do so, which neither the *Notice of Proposed Rule Making in MM Docket No. 97-216* nor the *NPRM* in the instant proceeding purport to do. ^{6/}

^{5/} *But see* footnote 2, *supra*.


^{6/} The Commission is, of course, free to change its policy. In doing so, however, it must provide a reasoned opinion or analysis of the basis for the change. *See, e.g., CBS, Inc. v. FCC*, 454 F.2d 1018, 1025 (D.C. Cir. 1971). Inasmuch as the *Notice of Proposed Rule Making in MM Docket No. 97-216* did not threaten the continuing vitality of the policy established in *Newnan and Peachtree City*, while the *NPRM* in the instant proceeding does so but without reason or analysis, the fundamental elements of rational agency decision making appear not to have been satisfied.

5. In any event, if the Commission decides to modify or to overrule the policy adopted in *Newnan and Peachtree City*, such a decision should not be applied retroactively to affect proceedings -- such as MM Docket No. 97-216 -- that were initiated and prosecuted in good-faith reliance upon the continuing vitality of that policy. Nothing in the *Notice of Proposed Rule Making in MM Docket No. 97-216*, *supra*, gave Fuller-Jeffrey or any other party notice that the policy adopted in *Newnan and Peachtree City* might be revisited; to that extent, Fuller-Jeffrey's circumstance differs from that of Southern in the instant proceeding, as Southern was at least put on notice in the *NPRM* that the policy might be overturned. It would be manifestly unfair to Fuller-Jeffrey -- whose efforts to change WPKQ's city of license date back to the filing of the original petition for rule making on April 25, 1997 by Fuller-Jeffrey Broadcasting Corporation of Greater Des Moines, Fuller-Jeffrey's predecessor as the licensee of WPKQ -- for the Commission to have proceeded so slowly in MM Docket No. 97-216 that Fuller-Jeffrey's efforts over the past 19 months now risk being undone by an action that the Commission's staff contemplates taking, *sua sponte* and without explanation, in an unrelated proceeding that was not even launched until Fuller-Jeffrey's proceeding had been pending before the Commission for nearly one entire year from the date of the adoption of the *Notice of Proposed Rule Making in MM Docket No. 97-216*.

WHEREFORE, Fuller-Jeffrey respectfully urges the Commission to leave the policy established in *Newnan and Peachtree City* intact; or, if that policy is to be overruled, to overrule that policy only in proceedings in which the *Notice of Proposed Rule Making* had given affected parties notice that such action was being contemplated.

Respectfully submitted,

FULLER-JEFFREY RADIO OF NEW ENGLAND, INC.

By: 
John Griffith Johnson, Jr.
Heidi Atassi Gaffney ^{2/}
Its Counsel

Paul, Hastings, Janofsky & Walker, LLP
1299 Pennsylvania Avenue, N.W.
Tenth Floor
Washington, D.C. 20004-2400
Telephone: (202) 508-9500
Facsimile: (202) 508-9700

November 17, 1998


^{2/} Admitted in the State of Ohio only; supervision by John Griffith Johnson, Jr., a member of the District of Columbia Bar.

CERTIFICATE OF SERVICE

Sabrina Underwood, a secretary in the law firm of Paul, Hastings,
Janofsky & Walker, LLP, does hereby certify that she has on this 17th day of
November, 1998, caused copies of the foregoing **FULLER-JEFFREY RADIO OF
NEW ENGLAND, INC.'S REPLY COMMENTS** to be mailed to the following by
first-class United States mail, postage prepaid:

Gary S. Smithwick
James K. Edmundson
Smithwick & Belendiuk, P.C.
1990 M Street, N.W.
Suite 510
Washington, D.C. 20036
Counsel to Southern Broadcasting of Pensacola, Inc.

Howard M. Weiss
Anne Goodwin Crump
Fletcher, Heald & Hildreth, P.L.C.
1300 North Seventeenth Street
Eleventh Floor
Arlington, Virginia 22209-3801
Counsel to LBSJ Broadcasting Company, L.P.


Sabrina Underwood